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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 854

FOY O. WILEMON AND AMOS E. WILEMON, doing business under the trade name of Good Luck Oil Company, A Partnership,

Petitioners,

VS.

PRENTISS M. BROWN, Administrator, office of Price Administration, et al., (CHESTER BOWLES, Substituted as party Appellant in the place and stead of PRENTISS M. BROWN),

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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No.———

FOY O. WILEMON AND AMOS E. WILEMON, doing business under the trade name of Good Luck Oil Company, A Partnership,

Petitioners,

VS.

PRENTISS M. BROWN, Administrator, office of Price Administration, et al., (CHESTER BOWLES, Substituted as party Appellant in the place and stead of PRENTISS M. BROWN),

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

To the Honorable, the Supreme Court of the United States:

Now come Foy O. Wilemon and Amos E. Wilemon, doing business under the trade name of Good Luck Oil Company, a partnership, hereinafter called Petitioners, and petition-

ing for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

Statement of the Case

Foy O. and Amos E. Wilemon, doing Business under the trade name of Good Luck Oil Company, a partnership, own and operate a chain of seven retail gasoline filling stations in the City of Dallas, Texas. And they also own the real estate on prominent business corners of the City of Dallas, upon which they have erected magnificent structures and equipment to house their business. Their sales of gasoline and other petroleum products, together with their repair and accessory business, amounts to more than $1,000,000 per year. Exclusive of their good will and trade name which they have built up over a period of more than twelve years, they have an investment of well in excess of a million dollars. (R. 3).

On or about May 1st, 1943, they were served with an "order" by Talbot Smith, Regional Attorney for the Office of Price Administration, Region V, commanding them to appear before Israel Treiman, "Hearing Commissioner", on May 7th, 1943, to show cause why they should not be suspended from further engaging in and carrying on their business for such time as the "Hearing Commissioner" might deem proper, for having violated certain provisions of Ration Order 5C. (R. 14-16). The "Charges" against them were, (1) On or about April 8th, 1943, they, as a licensed distributor, and accountable for all gasoline cou-

pons and other evidences received by them, did not have in their possession or control, coupons or other evidences in gallonage value, which, when added to the gallonage represented by exchange certificates which had been transmitted to the State Motor Fuel Tax Administration, a total of all coupons or other evidence deposited in their ration bank account, equivalent in gallonage value to the number of gallons which they had transferred at said time. (R. 15)

(Note: by this charge is meant that Petitioners had sold more gasoline than they had ration coupons to show for.)

(2), On April 8th, 1943, they had in their possession about 1,063 No. 6 Class A Ration Coupons, which they had accepted in exchange for gasoline prior to the effective date of said No. 6 Class A Ration Coupons.

(3), They had in their possession coupons issued as a ration, or part of a ration book, to which they were not entitled, and which they had not acquired in accordance with the provisions of Ration Order 5C. (R. 15).

(Note: Charges (2) and (3) constitute the same transaction, but is charged twice in different language).

(4), They accepted coupons in exchange for gasoline on or about April 8th, 1943, upon which there had not been then and there clearly written, on the reverse side of each such coupon by the person to whom it was issued, the information required in Ration Order 5C. (R. 15).

(Note: That Petitioners did not make the purchasers of gasoline write the License number and state of registration of their motor vehicles on the back of the coupon.)

The hearing before the "Hearing Commissioner" was passed from May 7th, 1943, until May 17, 1943, at which time Petitioners appeared in "obedience" to the "order" of the Regional Attorney, and after the completion of the hearing, at which they proved to the satisfaction of the "Hearing Commissioner" (R. 98-99) they were not guilty of any of the charges, but admitted that they had received the Class A No. 6 coupons alleged prior to their effective dates, but had done so on the advice of the Dallas County Rationing Board (Bettie Wolfe R. 62-77) that they could accept the coupons in advance of their due date and hold them until such date as they would become due, if they had enough gasoline on hand so to do, and then turn them in.

After having announced at the hearing in an oral opinion (R. 98-99) that he had absolved Petitioners from all charges save and except that they had accepted the 1,066 No. 6 Class A Coupons prior to their effective date, and further announced, although this does not appear in the Record or Proceedings, that he "was willing to concede they had accepted these coupons in good faith, but they were guilty of gross negligence in not reading and informing themselves of the rules and regulations issued", the "Hearing Commissioner" on May 25th, 1943, issued

his "order" suspending Petitioners "from selling, transferring, or dealing in gasoline for a period of two (2) weeks, commencing at 12.01 A. M., June 14, 1943, and ending at 12.01 A. M., July 1, 1943. (R. 18).

From this order of the "Hearing Commissioner", Petitioners timely filed their petition for review to the "Hearing Administrator at Washington, D. C., in accordance with Procedural Regulation No. 4, and on July 20th, 1943, Gerome Walsh, "Acting Deputy Hearing Administrator", affirmed the order and judgment of the "Hearing Commissioner" and re-fixed the date of suspension, and adding a couple of days from 12.01 A. M. August 8, 1943 to 12.01 A. M. August 25, 1943. (R. 18-22).

August 7th, 1943, Petitioners after so exhausting their administrative remedies, filed their petition in the District Court of the United States for the Northern District of Texas, seeking to restrain the enforcement of this penalty, alleging such penalty was in violation of Articles I and III of and Amendments V and X to the Constitution of the United States, and such penalty involved was of more than the value of Three Thousand Dollars. (R. 1-9). By agreement the enforcement of the penalty was stayed pending the final disposition of the suit, (R. 8), making it unnecessary to seek temporary restraining order and injunction.

The cause was tried on its merits, September 27th, 1943, and on September 29th, 1943, the Honorable William H.

Atwell, United States District Judge, delivered and filed his written opinion, sustaining the position of Petitioners (R. 99-106), and, in accordance with said Opinion, Final Judgment, permanently restraining the Office of Price Administration from enforcing this penalty was entered October 2nd, 1943. (R. 107).

The Office of Price Administration, Appellants below, on October 18, 1943 (R. 108, 110) duly filed their notice of appeal. The case was submitted by briefs and oral arguments December 13, 1943, and on January 13, 1944 the United States Circuit Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District Court of the United States for the Northern District of Texas with directions to dismiss the injunction (R. 116), and judgment was entered accordingly (R. 122).

On February 3, 1944, and within the time allowed, Petitioners filed their motion and brief for rehearing, which was by the Court on March 3, 1944, denied without written opinion (R. 158). On March 8, 1944, upon application by Petitioners (R. 159), mandate was stayed for a period of thirty days (R. 162) pending this petition for certiorari.

Statement as to Jurisdiction

This cause originated in the District Court of the United States for the Northern District of Texas upon Petitioners' complaint seeking to enjoin the Office of Price Admin-

istration, an agency of the United States government, from enforcing administrative penalties against Petitioners. Upon judgment granting such relief, the Office of Price Administration appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which said Court reversed and remanded the cause and thereafter overruled petition for rehearing.

Jurisdiction of this cause is conferred upon the Supreme Court of the United States: (1) By Section 347a, U. S. C. A., Title 28; (2) violation by the Office of Price Administration of the Constitution of the United States is involved; (3) Paragraph 5(b) of Rule 38, Court Rules of the Supreme Court of the United States, in that (1) the United States Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; (2) has decided a federal question in a way probably in conflict with applicable decisions of this Court; and (3) has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Questions Presented

1.

Whether Congress by the enactment of the Act of June 28, 1940, as amended by the Act of May 1, 1941 (Priorities and Allocations Act), and by Title III of the Second War Powers Act, delegated or attempted to delegate to executive

and administrative agencies power to suspend business covered by such Act by administrative procedure.

Petitioners alleged in their complaint (R. 6-8) and the trial court found (R. 104): "The Congress did not vest in the defendant such a power as is here exhibited."

2.

Whether Congress, if it did or intended so to do, acted within its constitutional limitations.

Petitioners alleged in their complaint (R. 6-8) that if Congress delegated or attempted to delegate such powers to the executive, it acted in violation of Articles 1 and 3 of and Amendments 5 and 10 to the Constitution of the United States, and the trial court found (R. 104): "If it did, it presmued to act improperly, which presumption will be indulged. We must find that it acted constitutionally, if possible, and lay the blame where it belongs, to-wit, on the Board".

3.

Whether an injunction granted by a trial court, restraining the enforcement of an administrative penalty, may be set aside where it is neither shown nor urged that there was an abuse of discretion.

Petitioners alleged in their complaint (R. 6), and the Hearing Commissioner found that the violation for which

he suspended Petitioners' business was not a wilful violation, but the suspension order was entered on account of the gross negligence of Petitioners. The trial court in its opinion (R. 100) emphasized this point, and quoted from the Hearing Commissioner's finding: "They had not wilfully violated this provision, but they had been guilty of gross negligence and carelessness, warranting a severe penalty".

Reasons Relied Upon for the Allowance of the Writ

1.

In holding that Congress intended to and did delegate to the Office of Price Administration power and authority to administer administrative suspensions which amount to penalties fixed for past violations, the United States Circuit Court of Appeals for the Fifth Circuit decided an important question of federal law in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decisions in *Adkins vs. Childrens Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394; *Panama Refining Co. vs. Ryan*, 293 U. S. 386, 79 L. Ed. 446; *Schecter vs. U. S.* 295 U. S. 494, 79 L. Ed. 1570; *Wallace vs. Cutten*, 298 U. S. 229, 80 L. Ed. 1157; *U. S. vs. La France*, 282 U. S. 567, 75 L. Ed. 551; and *O'Sullivan vs. Felix*, 233 U. S. 318, 58 L. Ed. 980.

2.

The Congress of the United States provided in subdivision (a) of Section 925, Title 50 U. S. C. A. (the enforcement provision of the law here in question): "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904, Title 50, U. S. C. A.) he may make application to the appropriate court for an order enjoining such acts or practices * * *". Both the Hearing Commissioner and the United States District Judge found that Petitioners had not wilfully violated any provision of Ration Order 5c, and there was no evidence of any continued violation or attempts to continue to violate any of such orders. The above quoted Act clearly gives the United States District Courts jurisdiction of proceedings thereunder. Petitioners' complaint to enjoin the enforcement of the penalty of suspension administratively fixed by the Office of Price Administration clearly presented all equitable features to the trial court for its disposition. The Hearing Commissioner held and the trial court found in its opinion (R. 100) that the violation for which the administrative suspension was assessed was an isolated one and was not a wilful violation, and when the United States Circuit Court of

Appeals reversed and remanded this cause to the trial court with direction to dismiss the injunction, it decided an important question of federal law in a way to conflict with the applicable decisions of the Supreme Court, and particularly in conflict with *Hecht Co. vs. Bowles*, 88 L. Ed. 465, reported in Advance Sheet No. 9 of Vol. 88 L. Ed., recently decided by this Honorable Court.

3.

The United States Circuit Court of Appeals decided an important question of federal law in this cause which has not been, but should be, settled by the Supreme Court.

WHEREFORE your Petitioners respectfully pray that a writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify to this Court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket No. 10840, PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL, APPELLANTS, VS. FOY O. WILEMON AND AMOS E. WILEMON, DOING BUSINESS UNDER THE TRADE NAME OF GOOD LUCK OIL COMPANY, A PARTNERSHIP, APPELLEES, and that the judgment of the Circuit Court of Ap-

peals may be reversed and that of the trial court affirmed; and that your Petitioners have such other relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

EUSTIS MYRES,
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Dallas, Texas
Counsel for Petitioners.

HOWARD DAILEY,
Republic Bank Building,
Dallas, Texas
Of Counsel.

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FOY O. WILEMON AND AMOS E. WILEMON, Doing Business Under the Trade Name of GOOD LUCK OIL COMPANY, A Partnership,

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Respondents.

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SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

In support of their petition for writ of certiorari, the Petitioners respectfully show to the Court:

1.

Opinions of the Courts Below

The opinion of the District Court of the United States is reported in 51 Fed. Supp. 978, and appears in the Record at pages 99 to 106 and the appendix hereto. The opinion of the United States Circuit Court of Appeals has not been reported, but appears at page 116 of the Record and in the appendix hereto.

2.

Jurisdiction

(a) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was handed down January 13, 1944; petition for rehearing was denied March 3, 1944.

(b) This Court has jurisdiction under Title 28, U. S. C. A. Section 347a, and under paragraph 5(b) of Rule 38 of the Court Rules of the Supreme Court of the United States.

(c) The jurisdiction of this Court is invoked upon the following grounds:

(1) In holding that Congress intended to and did delegate to the Office of Price Administration power and authority to promulgate and enforce administrative suspensions which amount to penalties fixed for past violations, the United States Circuit Court of Appeals for the

Fifth Circuit decided an important question of federal law in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decisions in *Adkins vs. Childrens Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394; *Panama Refining Co. vs. Ryan*, 293 U. S. 386, 79 L. Ed. 446; *Schecter vs. U. S.*, 295 U. S. 494, 79 L. Ed. 1570; *Wallace vs. Cutten*, 298 U. S. 229, 80 L. Ed. 1157; *U. S. vs. La France*, 282 U. S. 567, 75 L. Ed. 551; and *O'Sullivan vs. Felix*, 233 U. S. 318, 58 L. Ed. 980.

(2) The Congress of the United States provided in subdivision (a) of Section 925, Title 50, U. S. C. A. (the enforcement provision of the law here in question): "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904, Title 50, U. S. C. A.) he may make application to the appropriate court for an order enjoining such acts or practices * * *". Both the Hearing Commission and the United States District Judge found that Petitioners had not wilfully violated any provision of Ration Order 5c, and there was no evidence of any continued violation or attempts to continue to violate any of such orders. The above quoted Act clearly gives the United States District Courts jurisdiction of proceedings thereunder. Petitioners' complaint to enjoin the enforcement of the penalty of suspension administratively fixed by the Office of Price Administra-

tion clearly presented all equitable features to the trial court. The Hearing Commissioner held and the trial court found in its opinion (R. 100) that the violation for which the administrative suspension was assessed was an isolated one and was not a wilful violation, and when the United States Circuit Court of Appeals reversed and remanded this cause to the trial court with direction to dismiss the injunction, it decided an important question of federal law in a way to conflict with the applicable decisions of the Supreme Court, and particularly in conflict with *Hecht Company vs. Bowles*, 88 L. Ed., 465, reported in Advance Sheet No. 9 of Vol. 88 L. Ed., recently decided by this Honorable Court.

(3) The United States Circuit Court of Appeals decided an important question of federal law in this cause which has not been, but should be, settled by the Supreme Court.

STATEMENT OF THE CASE

Proceedings Below

Foy O. and Amos E. Wilemon, doing Business under the trade name of Good Luck Oil Company, a partnership, own and operate a chain of seven retail gasoline filling stations in the City of Dallas, Texas, and they also own the real estate on prominent business corners of the City of Dallas, upon which they have erected magnificent structures and equipment to house their business. Their

sales of gasoline and other petroleum products, together with their repair and accessory business, amounts to more than $1,000,000 per year. Exclusive of their good will and trade name which they have built up over a period of more than twelve years, they have an investment of well in excess of a million dollars. (R. 3).

On May 1st, 1943, they were served with an "order" by Talbot Smith, Regional Attorney of the Office of Price Administration, Region V, commanding them to appear before Israel Treman, "Hearing Commissioner", on May 7th, 1943, to show cause why they should not be suspended from further engaging in and carrying on their business for such time as the "Hearing Commissioner" might deem proper, for having violated certain provisions of Ration Order 5C. (R. 14-16). The "Charges" against them were, (1) On or about April 8th, 1943, they, as a licensed distributor, and accountable for all gasoline coupons and other evidences received by them, did not have in their possession or control. coupons or other evidences in gallonage value, which, when added to the gallonage represented by exchange certificates which had been transmitted to the State Motor Fuel Tax Administrator, a total of all coupons or other evidence deposited in their ration bank account, equivalent in gallonage value to the number of gallons which they had transferred at said time. (R. 15)

(Note: That Petitioners had sold more gasoline than they had ration coupons to show for.)

(2), On April 8th, 1943, they had in their possession about 1,063 No. 6 Class A Ration Coupons, which they had accepted in exchange for gasoline prior to the effective date of said No. 6, Class A Ration Coupons.

(3), They had in their possession coupons issued as a ration, or part of a ration book, to which they were not entitled, and which they had not acquired in accordance with the provisions of Ration Order 5C. (R. 15).

(Note: Charges (2) and (3) constitute the same transaction, but is charged twice in different language).

(4), They accepted coupons in exchange for gasoline on or about April 8th, 1943, upon which there had not been then and there clearly written, on the reverse side of each such coupon by the person to whom it was issued, the information required in Ration Order 5C. (R. 15).

(Note: That Petitioners did not make the purchasers of gasoline write the License number and state of registration of their motor vehicle on the back of the coupon.)

The hearing before the "Hearing Commissioner" was passed from May 7th, 1943, until May 17th, 1943, at which time Petitioners appeared in "obedience" to the "order" of the Regional Attorney, and after the completion of the hearing, at which they proved to the satisfaction of the "Hearing Commissioner" (R. 98-99) they were not guilty of any of the charges, but admitted that they had received the Class A No. 6 coupons alleged prior to their

effective dates, but had done so on the advice of the Dallas County Rationing Board (Bettie Wolfe R. 62-77) that they could accept the coupons in advance of their due date and hold them until such date as they would become due, if they had enough gasoline on hand so to do, and then turn them in.

After having announced at the hearing in an oral opinion (R. 98-99) that he had absolved Petitioners from all charges save and except that they had accepted the 1,063 No. 6 Class A Coupons prior to their effective date, and further announced that he "was willing to concede they had accepted these coupons in good faith, but they were guilty of gross negligence in not reading and informing themselves of the rules and regulation issued", the "Hearinf Commissioner" on May 25th, 1943, issued his "order" suspending Petitioners "from selling, transferring, or dealing in gasoline for a period of two (2) weeks, commencing at 12.01 A. M., June 14, 1943, and ending at 12.01 A. M., July 1, 1943. (R. 18).

From this order of the "Hearing Commissioner", Petitioners timely filed their petition for review to the "Hearing Administrator at Washington, D. C., in accordance with Procedural Regulation No. 4, and on July 20th, 1943, Gerome Walsh, "Acting Deputy Hearing Administrator", affirmed the order and judgment of the "Hearing Commissioner" and re-fixed the date of suspension, and adding a couple of days, from 12.01 A. M. August 8, 1943 to 12.01 A. M. August 25, 1943. (R. 18-22).

August 7th, 1943, Petitioners after so exhausting their administrative remedies, filed their petition in the District Court of the United States for the Northern District of Texas, seeking to restrain the enforcement of this penalty, alleging such penalty was in violation of Articles I and II and Amendments V and X to the Constitution of the United States, and such penalty involved was of more than the value of Three Thousand Dollars. (R. 1-9). By agreement the enforcement of the penalty was stayed pending the final disposition of the suit, (R. 8), making it unnecessary to seek temporary restraining order and injunction.

The cause was tried on its merits, September 27th, 1943, and on September 29th, 1943, the Honorable William H. Atwell, United States District Judge, delivered and filed his written opinion, sustaining the position of Petitioners, (R. 99-106), and, in accordance with said Opinion, Final Judgment, permanently restraining the Office of Price Administration from enforcing this penalty was entered October 2nd, 1943. (R. 107).

The Office of Price Administration, Appellants below, on October 18, 1943 (R. 108, 110) duly filed their notices of appeal. The case was submitted by briefs and oral arguments on December 13, 1943, and on January 13, 1944, the United States Circuit Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District

Court of the United States for the Northern District of Texas with directions to dismiss the injunction (R. 116), and judgment was entered accordingly (R. 122).

On February 3, 1944, and within the time allowed, Petitioners filed their motion and brief for rehearing, which was by the Court on March 3, 1944, denied without written opinion (R. 158). On March 8, 1944, upon application by Petitioners (R. 159), mandate was stayed for a period of thirty days (R. 162) pending this petition for certiorari.

Findings Below

HEARING ADMINISTRATOR: That the offense for which Petitioners' business was suspended was not a wilful violation, but one of such gross negligence as to warrant a severe penalty (R. 21).

THE TRIAL COURT: "The Congress did not vest in the defendants such a power as here exhibited. If it did, it presumed to act improperly, which presumption will be indulged. We must find that it acted constitutionally, if possible, and lay the blame where it belongs, to-wit, on the Board."

"Upon the trial, the facts were stipulated. This stipulation fixed their (Petitioners') damages at approximately $10,000,00. Testimony accompanying the stipulation shows that a Mrs. Wolfe, an employee of the plaintiff (Petitioners), telephoned the O. P. A. Dallas office and asked

about coupons that had been improvidently taken before they were valid. She claims that a woman, who answered the phone, told her that she could hold the coupons and turn them in to the refinery after they became valid."

"The authority of an employee in the O. P. A. office to make such a statement is denied by the superintendent. It must be assumed, however, that something of this sort transpired, because the 'Hearing Administrator' declared that the holding and taking of the coupons was not wilful. The record also discloses that in the early days of allocation that procedure may have been indulged in by some dealers." (R. 100, 101).

CIRCUIT COURT OF APPEALS: "It is true that the Office of Price Administration, like many other administrative boards and commissions, has put forth a great mass of regulations which look like legislation and has established an elaborate system of quasi courts. It is said thus to have established an *imperium in imperio*, and this has provoked adverse public comment." (R. 120).

Statutes & Orders in Question

The Office of Price Administration claimed that authority to issue the orders and directives here complained of and hereinafter set out was given them by Section 2(a) of Acts of June 28, 1940, 54 Stat. 676, as amended by Act May 31, 1941, 55 Stat. 236, entitled "Priorities and Allocations Act", and by Title 3 of the Second War

Powers Act 1942, March 27, 56 Stat. 176, 50 U. S. C. A. Appendix 636. Claiming the above provisions of Congress as their authority, the Office of Price Administration issued Ration Order 5c, labelled "Mileage Rationing; Gasoline Regulations" (7 F. R. 9798), which provides, among other things: "Any person who violates this Ration Order No. 5c, may by administrative suspension order, be prohibited from receiving any transfers or deliveries of or selling or using or otherwise disposing of, any gasoline or other rationed product or facilities. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

Pursuant to the power which they claimed was delegated to them by the above mentioned statutes, the Administrator of the Office of Price Administration issued General Order No. 46, creating the office of "Hearing Administration", which provided for the appointment by the Administrator of a "Hearing Administrator" and numerous "Hearing Commissioners", the Hearing Commissioners to hear complaints brought by the Office of Price Administration and, by administrative order, suspend businesses of those engaged in the handling of rationed products for any period of time his judgment dictated, and the only remedy open to one so suspended was an appeal to the Hearing Administrator.

On February 6, 1943, the Administrator issued Procedural Regulation No. 4, effective March 1, 1943, which provided for a hearing before a Hearing Administrator and for suspension decrees, 8 F. R. 1744, 2035. This order constitutes their "Judicial Code."

Specification of Errors

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 116) and its judgment based upon such opinion (R. 122) are erroneous, in that:

1. Congress, by the passage of Section 2(a), Acts of June 28, 1940, 54 Stat. 676, as amended by Act May 31, 1941, 55 Stat. 236, entitled "Priorities and Allocations Act", and by Title 3 of the Second War Powers Act, 1942, March 27, 56 Stat. 176, 50 U. S. C. A. Appendix 636, did not delegate to the Office of Price Administration or to any one else power to administratively suspend the business of your Petitioners.

2. If Congress did so delegate such power, it acted in violation of Articles I and II of and Amendments 5 and 10 to the Constitution of the United States.

3. The trial court having found, with adequate evidence to support such finding, that Petitioners had not violated any provisions of Ration Order 5c, and within its discretion having restrained the enforcement of the penalty assessed, the United States Circuit Court of Appeals may not set aside such restraining order where the

abuse of the discretion of the trial court is neither pleaded nor proved, even if Congress, within its constitutional limitations, has delegated to the Office of Price Administration the powers claimed by them.

Brief of the Argument under Question 1, Germane to Specifications of Error 1 and 2

It is presumed, until the contrary is shown, that Congress acted within the scope of its Constitutional authority in the passage of the law here under discussion. If it did it did not intend to grant to the Office of Price Administration power and authority to set up the "Office of Hearing Administration" to act and function as courts in usurpation of the functions of the judiciary with full power and authority to adjudicate and fix penalties. In the first place the judicial powers of the Government is not Congress' to give. That power was fixed in and given to the judiciary by the Constitution as was the legislative power given to Congress. That the "suspension" orders being meted out by the "Office of Hearing Administration" are penalties and not allocations under all the decisions of our Courts, as will be unquestionably shown in a later discussion in this brief is unquestionable. Surely it will be admitted by Appellants that Congress cannot delegate power to executive agencies to fix penalties!

"The legislature cannot delegate to an administrative board the authority to fix the penalty for a violation of orders or regulations which the legislature authorized the

board to make. The penalty must be fixed by the legislature itself. *Howard vs. State* (1922) 154 Ark. 430, 242 S. W. 818 (arguendo); *State vs. Atlantic Coast Line R. Co.* (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. (N.S.) 639. (arguendo); *Zuber vs. Southern R. Co.* (1911) 9 Ga. App. 539, 71 S. E. 937. And see *U.S. vs. Breen* (1889) 40 F. 402, infra, III. m; *Tuttle vs. Wood* (1930) Tex. Civ. App. 35 S. W. (2) 1061.

"As stated in a Georgia case: 'To say that wrongful and neglectful conduct shall be penalized is such a legislative function as cannot be delegated by the legislature. That this is true as to penalties of a criminal nature will not be questioned, and we believe that the same principle applies where a wrong or neglect is penalized by giving the person against whom the wrong or neglect particularly operates the right to recover punitive damages in a civil action. In other words, it is purely a legislative function to authorize the imposition of punitory liability, whether that liability is to be enforced in a civil or criminal action. The legislature may authorize an administrative body or officer to make regulations, and may declare it to be punishable for any person to violate those regulations; but, unless the legislature itself gives its sanction, at least in general terms, to the imposition of punishment, or of civil redress in the nature of punishment, for an act or general class of acts, no merely administrative board can provide for the punishment of that act or class of acts and supply the details of how and when the penalty or punishment shall be imposed.'"

(Anno. Delegation of Legislative Power, following Panama Refining Co. vs. Ryan, 293 U. S. 386, 79 L. Ed. 446 at Page (L. ed.) 491-492).

That Congress knew and abided by this cardinal principle of law is evident, for it provided the penalties for violators of the act and rules and regulations issued thereunder, and conclusively showed that they did not intend for the Office of Price Administrator to "legislate" penalties of its own. Section 925 of Title 50, U. S. C. A., (The enforcement provision of the law here in question), provides:

"(a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904 of this Appendix), he may make application to the appropriate Court for an order enjoining such acts or practices, or for order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

"(b) Any person who wilfully violates any provision of Section 4 of this Act (Section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under Section 2 or 202 (Sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subjected to a fine of not more than $5,000.00, or to imprison-

ment for not more than two years in the case of a violation of Section 4 (c) (Section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

"(c) The district courts shall have jurisdiction of criminal proceedings for violations of Section 4 of this Act (Section 904 of this Appendix), and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act (This Section). Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2) (This Section), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceedings under this Act."

It is inconceivable, in view of such complete pattern of enforcement, that the Office of Price Administration could think Congress left to it, even if it were within the power of Congress to do so, any discretionary powers to fix additional penalties or punishments of its own. The machinery of punishment is so complete, so detailed and so precise that, had it meant that any other penalty or punishment should be meted out, it would have so said.

> "The Secretary of the Treasury cannot, by his regulation, alter or Amend a revenue law, nor put into the body of the Statute a limitation which Congress did not think it necessary to prescribe." Worrell v. Jones, 106 U. S. 267; United States v. Jones, 144 U. S. 591.

The very nature and wording of the Acts unquestionably shows that Congress knew that it, and it alone, could prescribe penalties and punishments for violations of this Act and rules and regulations promulgated hereunder.

In justifying their position in the assumption of the power to issue administrative suspensions the Office of Price Administration urges that Congress knew that the boards had been claiming the power to, and in fact, had been issuing suspension orders against dealers who they claimed had violated the rationing regulations (Senate Report 989, 77th Congress, Second Session) (88 Congress Record, February 24, 1942, page 1634). With this position your Petitioners can not agree.

After it had been brought to the attention of Congress that the Office of Price Administration had assumed and

was exercising such powers, the House of Representatives appointed a committee to investigate such activities on the part of the Office of Price Administration. By House Resolution 102, 78th Congress, 1st Session, the House of Representatives passed the following Resolution:

> "RESOLVED, That a committee of seven Members of the House of Representatives be appointed by the Speaker of the House, which said committee is authorized to conduct investigations of any action, rule, procedure, regulation, order, or directive taken or promulgated by any department or independent agency of the Federal Government where complaint is made to said committee that such action, rule, regulation, procedure, order, or directive—
>
> "(1) Is beyond the scope of the power or authority granted to such department or independent agency by Congress or by Executive Order.
>
> "(2) Invades the Constitutional rights, privileges, or immunities of citizens of the United States.
>
> "(3) Inflicts penalties for failure to comply with such rules, regulations, or directives, without affording those accused of violation an opportunity to present their defense before a fair and impartial tribunal.
>
> "The said committee shall report to the Congress from time to time the results of such investigations and such recommendations as they see fit with the respect to the personnel of those administering any such department or independent agency, or shall recommend such legislation or amendments to existing legislation as they deem desirable.

"The Committee or any subcommittee thereof, shall have power to hold hearings and to sit and act anywhere within or without the District of Columbia, whether the House is in Session or had adjourned, or is in recess; to require by subpoena or otherwise the attendance of witnesses and the production of books, papers, and documents; to administer oathes; to take testimony; to have printing and binding done; and to make such expenditures as it deems advisable within the amount appropriated therefor. Subpoena shall be issued under the signature of the chairman of the committee and shall be served by any person designated by him. The provisions of Sections 102 to 104, inclusive, of the Revised Statutes shall apply in the case of any failure of any witness to comply with any subpoena or to testify when summoned under authority of this resolution."

Pursuant to that Resolution, the Hon. Sam Rayburn, Speaker of the House, appointed the Honorable Howard W. Smith of Virginia Chairman of the committee, and to serve with him, the Hons. John J. Delaney, Hugh Peterson, Jerry Voorhis, Fred A. Hartley, Jr., John Jennings, Jr., and Clare E. Hoffman. This Committee is known and designated the SELECT COMMITTEE TO INVESTIGATE EXECUTIVE AGENCIES HOUSE OF REPRESENTATIVES, Seventy-Eighth Congress, First Session, and on November 15th, 1943, that Committee made its Second Intermediate Report to the House.

On page 2 of this report, page 42, the Committee said:

"The committee finds that the Office of Price Administration has assumed unauthorized powers to legislate

by regulation and has, by misinterpretation of acts of Congress, set up a Nation-wide system of judical tribunals through which this executive agency judges the actions of American Citizens relative to its own regulations and orders and imposes drastic and unconstitutional penalties upon those citizens, depriving them in certain instances of vital rights and liberties without due process of law. This seizure of judicial and legislative functions of government by the Office of Price Administration is traced in detail in the following pages.

"The committee believes that the facts here presented reveal practices which if not halted might conceivably lead to the undermining of our basic constitutional provisions for separate and independent executive, legislative, and judicial departments of governments."

And again on page 3 of this report, the committee continues:

"Under the Constitution the Government of the United States is divided into three great departments. The separation of powers into legislative, executive, and judicial branches is sound constitutional doctrine in the United States today. It follows that the concentration of all three categories of power into the hands of the executive branch with merely a limited and circumscribed review by the Courts violates basic principle of the Constitution and constitutes a dangerous approach toward totalitarianism.

"No executive agency should have or assume power to enact subordinate legislation in the form of rules, regulations and orders execept within limited and rigidly restricted bounds prescribed by Congress, nor should such agency be permitted to create mock courts to try offenders against such rules or inflict punishments upon such offenders.

"In addition to the statutory court created by the Emergency Price Control Act, your committee has found that the office of Price Administration has developed an unauthorized and illegal judicial system and that through the mass of rules and regulations daily enacted by that agency it has also developed such intricate and involved administrative review machinery that litigants are completely bewildered by the maze of procedure through which they must wander to eventually arrive at a court which will grant them only the crumbs of judicial relief. This situation must be changed and changed immediately."

The office of Price Administration contends that this Act had been back before Congress after the system of "Hearing Administration" suspensions had been put into effect. They say Congress knew about this practice, did nothing about it, and, therefore, sanctioned it. Here is what this Committee has to say about that:

> "Prior to the passage of the Second War powers Act the War Production Board, while having the power to allocate scarce materials for the purpose of speeding the war effort, lacked any power or legal authority

to enforce orders which it issued for that purpose. As a means of enforcement the Board adopted a system of punishing those who violated its orders by depriving them of further access to such materials.

"The imposition of such punishments or penalties is nowhere authorized by any of the statutes pursuant to which the War Production Board operates. Its sole justification for the use of these so-called sanctions is (1) to deny that the sanctions are penalties, and (2) to state that the Congress has not since affirmatively disapproved of this conduct and hence must be considered as having tacitly approved of it. Your committee thinks this is a ridiculous position for any supposedly responsible agency of the Government to take. To make the matter still more ridiculous, the War Production Board attempted to delegate this assumed and illegal power to the Office of Price Administration." (Pages 13-14 Committee Report).

Citing and approving Judge Atwell's opinion in this very case before this Honorable Court, this Committee further said:

"This entire pseudo judiciary has been established without statutory authorization and despite the fact that the statute contains ample enforcement and penal provisions. The Second War Powers Act provides that violations of its provisions or of rules or orders issued pursuant to it shall be enjoined. It provides further for fine and imprisonment of wilful violaters. However, all of these provisions, naturally, require court action and, as has been pointed out, the Office of Price Administration consistently avoids recourse to court wherever possible. When there is a suspected violation of some

rule, regulation, or order, the person suspected is cited to appear before one of the 'Hearing Commissioners'. Upon the day set for hearing evidence is heard and thereafter a decision is rendered by the Hearing Commissioner. From his decision the defendant may appeal and the prosecutor, despite the penal nature of the proceeding, is likewise afforded this right. Such an appeal by the prosecution is closely analogous to the placing of the accused in double jeopardy, and your committee consequently condemns the practice.

"All appeals from decisions of Hearing Commissioners are subsequently reviewed by the Hearing Administrator at Washington. His decision is final and so far as possible recourse to Court is obstructed. An exhaustive brief was prepared in the Office of Price Administration for the purpose of ascertaining methods by which to obstruct in every way possible judicial review of decisions of the Hearing Administrator. Reference is made to the brief of Norma Zarky, found in the office of Thomas I. Emerson, Associate General Counsel in charge of the Enforcement Division of the Office of Price Administration, which covers in minute detail every phase of judicial review with the avowed purpose of limiting access to the courts.

"The establishment of a system of 'courts' within the Office of Price Administration was all that was necessary to make it a complete government, inasmuch as it already exercised executive and legislative powers. The agency recognizes this to be true as may be readily seen from its efforts to achieve a separation of powers along constitutional lines. However, no real separation of powers has been accomplished. The judicial branch does not hesitate to borrow personnel

from the executive to act as 'judge' in the trial of its cases.

"The punishment meted out by the Office of Price Administration to offenders which its 'courts' have found guilty is in many cases most severe. In the case of Toots Shor Restaurant in New York City, charged with consuming more meats than it was allowed, there was an expressed finding by the Hearing Commissioner that there was no element of wilfulness of the violation. The Hearing Commissioner rendered a decision to the effect that the owner of the restaurant could continue to get sufficient points for his normal allotment, but that he must set aside enough points over a 12-month period to take care of the amount which he had theretofore used in excess of said allotment. The enforcement attorneys appealed the case to the Hearing Administrator at Washington and the decision of the Hearing Commissioner was reversed. The Hearing Administrator entered an order depriving the Toots Shor Restaurant from serving or using any meats, fats, or oils (including butter and cooking oils) for a period of approximately 90 days. The testimony in this case showed that the owner had an investment of approximately one quarter of a milion dollars and that the restaurant did a tremendous business. Such an order is calculated to completely drive a person out of business.

"This is not an isolated nor even an extreme case of severity. Many individuals have been effectually put completely out of business for long periods. From March 1st, 1943, to October 1st, 1943, the Office of Price Administration issued a total of 4,062 suspension orders and its 'courts' are daily grinding them out. Suspension orders so issued are often of extreme

duration. The power assumed by the Office of Price Arministration to suspend the rights of individuals to receive rationed commodities enables it by its interpretation to suspend for a period ending December 31st, 1944, and sentences for this period have many times been inflicted.

"Your committee has found that in the New York region alone, during the period of less than 6 months, suspension orders were issued in 12 different cases depriving the persons 'convicted' of receiving rationed commodoties during the life of the Act, to wit: Until December 31st, 1944.

"Such action on the part of the office of Price Administration amounts to the taking of private property without due process of law.

"The harshness of the penalties inflicted by the Office of Price Administration is measured not only by the length of their duration, but also in other ways. Suspension orders directed against retail merchants invariably require the merchants during the period of the suspension to display his 'guilt' to the public at large in the same fashion as convicts in mediaeval times were branded or mutilated for the purpose of drawing public ridicule and contempt. Mimeograph suspension order forms found in the regional offices provides for the posting of printed notices of guilt required to be kept 'posted', plainly visible to the public, at place of business.

"While the courts, of course, protect citizens of this Nation from persecution and oppression insofar as they may, yet your committee urges that the Congress insure by statute that there will be no recurrence of such instances as are herein related." (Committee Report pages 14-17).

Even more significant and indicative of the fact that this Committee thinks Congress never intended for the Office of Price Administration to Establish such "Office of Hearing Administration" and to issue such suspensions will be found in the following portion of the report:

> "In order to avoid the necessity of court action and at the same time gain the unlawful power to suspend indefinitely the right of a person to do business, the Office of Price Administration has hit upon the dubious expedient of writing into its ration orders prohibitions of price violations. Such a prohibition is to be found in General Rations No. 8, which is applicable to all commodities over which the Office of Price Administration has rationing control. Section 2.10 of that order is as follows: 'No person shall, sell or otherwise transfer, and no person shall, in the course of trade or business, buy or receive, any rationed commodity at a price in excess of the applicable maximum price established for that commodity by the Office of Price Administration.'"
>
> "Coupled with this prohibition is a clause imposing the criminal penalties of the Second War Powers Act viz.: 'A $10,000.00 fine, one year imprisonment or both, upon offenders, despite the fact that the Emergency Price Control Act specifically fixes the penalty at a $5,000.00 fine, one year imprisonment or both, upon conviction.
>
> "Coupled also to General Ration Order 8 is section 4.1 which is as follows: 'Any person who violates a ration order may, by administrative suspension order, be prohibited from receiving any transfer or delivery of, or from selling, using, or otherwise disposing of, any rationed commodity."

By tacking implied provisions of the one law to the other, the Office of Price Administration has thus managed to take unto itself far more judicial power than either of the laws, taken separately, or even read together in their true meaning, could be construed to grant.

"As a matter of actual fact the Office of Price Administration, by so doing, has actually directly violated a congressional prohibition. The Emergency Price Control Bill, as originally introduced, provided for administrative revocation of licenses. The fact that the Congress deleted this provision and substituted in its place a revocation section requiring recourse to court for an order of revocation conclusively shows that Congress did not intend to grant, but intended positively to deny, the power which the Office of Price Administration has assumed.

"The extent to which the licensing provision of the Price Control Act has been ignored and administrative substitute has been used is strikingly revealed by information furnished your committee to the effect that 392 suspension orders had been issued during a 5-month period, based solely upon price violations, while during that same period, and one month beyond, only 10 proceedings for suspension of license had been instituted before the courts as provided by the provisions of the Price Control Act.

"The Office of Price Administration has consistently displayed a tendency, wherever conceivably possible, to avoid recourse to courts of law, even to the extent of stretching the statutes in some cases beyond all reasonable understanding. To combat and checkmate such dangerous trends your committee strongly urges the Congress that it specifically prohibit the

continuation of such assumption of power as herein set out." (Committee Report p. 18-19, p. 73-75 Appendix B).

Appellees contend that the various statutes passed by the Congress under which the Office of Price Administration attempts to set up its system of "courts" are so plain on their faces as to offer no room for doubt. In no conceivable way, we urge, could reasonable men read into them any such authority. It is a well settled principle of law that Congress does not legislate by innuendo, but Appellants so earnestly urge that Congress intended that they should have power to set up what the Committee calls its system of "pseudo" courts we have brought before this Honorable Court what at least one branch of Congress thinks of the system. This a regularly constituted and functioning committee, clothed with all the power possessed by the House of Representatives, and directed to investigate the very thing that is before this Honorable Court. The findings of that Committee are not only astounding, but shocking and amazing to those who have had no experience with them, but commonplace to us who have.

That Congress did not give such opwer to the Office of Price Administration as would allow them to set up the "Office of Hearing Administration" and its kindred corollaries to sit as courts, judge and sentence and to take people's property without due process is unquestionable. That they did not intend so to do is equally as clear.

As to appellant's contention that by remaining silent after it knew about suspension orders being issued by the Office of Price Administration, Congress had approved its acts, we do not agree. On the contrary, the reverse is true. Even if we did not have the report of the Select Committee, supra, we have ample authorities to sustain our position. On this point the courts have said:

> "Congress cannot be estopped by its silence from exercising its Constitutional powers of legislation. Nor does the silence of Congress indicate its approval or disapproval of matters coming to its knowledge in the course of its deliberation." United States vs. Chemical Foundation, 5 F. (2) 191 (Headnote 8 at page 210); affirming some cases below 294 F. 300, affirmed, U. S. vs. Chemical Foundation, 47 S. Ct., 272 U. S. 1, 71 Led. 131.

Under Question 2, Germane to Specifications of Error 1 and 2

Emergency Powers

Never since our Constitution was adopted have we had a great National catastrophe that the reformers did not come forward with their remedies. Each time they come forward with a brand new set of cure-all theories, but always resulting in a concerted attack upon the Fundamental Law of the Land. Each time they plead that they ought to be permitted to do what they seek to do because of "grave emergencies."

Each time they have been told by the courts that "grave emergencies" do not alter the Constitution; that the Constitution was conceived, designed, and adopted in a period of the most "grave emergency" through which this country has ever passed; that the Constitution was so conceived, designed, and adopted as a safeguard and anchor for a great Democratic Government in time of storm as well as in the calm. But they always come back for more.

They now plead that because of the present "grave emergency" this Honorable Court ought not to disturb them in their present state of usurpation of power. Let the courts tell them again.

Upon this point, in *Schechter vs. United States*, 295 U. S., 494, 79 L. Ed. 1570, Mr. Chief Justice Hughes said:

> "First. Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed

> to be adequate, as they have proved to be both in war and peace, but these powers of the National Government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment of, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'," citing also Ex parte Milligan 4 Wall. 2, 120, 121, 18 L. Ed. 281, 295, 296; Home Bldg. & L. Asso. vs. Blaisdell 290 U. S. 398, 426, 78 L. Ed. 413, 422, 54 S. Ct. 231, 88 A. L. R. 1481.

If then the Office of Price Administration has been permitted to set up its system of "Hearing Administration" with power and authority to issue such suspensions as is here before this Honorable Court, that power or necessity was delegated to it by Congress. As we said in the outset we do not believe such was delegated to them, because it is presumed that Congress acted within its Constitutional limitations, and such power as they presume to possess could not be delegated by the Congress. Such delegation of legislative power as they presume would be an unlimited delegation of power to deal with "violators" at will, fix whatever penalties their discretion dictated, in direct violation of Article I, Clause 1 of the Constitution of the United States, and to function under such delegation as a "court" is in direct violation of Article

III of the Constitution of the United States, and any penalty enforced under such system would be violative of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

Article I Section 1 of the Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article III Section 1 of the Constitution provides:

> "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Delegation of Legislative Power

Ration 5C, the terms of which Petitioners are alleged to have violated, provides:

> "Any person who violates this Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving and transfers or deliveries of, or selling or using or otherwise disposing of any gasoline or other rationed product, or facility. Such suspension order shall be issued for such period as in the judgment of the administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

No such powers as these are had by any United States District Judge. No Justice of this Honorable court possesses such authorities as are attempted here to be delegated to the "administrator" or to a "hearing commissioner." The administrator or "hearing commissioner" is the sole judge of guilt. His "judgment" is his only limitation.

Such unlimited delegation of legislative authority has ever been condemned. The exact question, "judgment" of the administrator or executive, was passed upon and condemned by the Supreme Court in *Panama Refining Co. vs. Ryan*, 293 U. S., 386, 79 L. Ed. 446; and in *Schechter vs. United States*, 295 U. S., 494, 79 L. Ed. 1570. In *Panama vs. Ryan*, supra, the Court said: "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute." In *Schechter vs. U. S.*, supra, the Court held that to leave to the President the discretion of setting up "Codes of Fair Competition" was invalid, because Congress left to the "judgment" of the President what "Fair Competition" was. If such functions cannot be left to the President of the United States, can a little "hearing commissioner" be bound only by his "judgment" as to when and for how long he will suspend a citizen, especially ones who have acted in good faith as Petitioners were found to have done?

All delegations of legislative powers to be valid must be within prescribed limits. *Gibson Auto Co. vs. Finnigan*, 259 N. W. 420; *O'Donoghue vs. United States*, 289 U. S. 516, 530, 77 L. Ed. 1356, 1360, 53 S. Ct. 740; *Crowell vs. Benson*, 285 U. S., 22, 50, 76, L. Ed. 598, 612, 52 S. Ct. 285; *Adkins vs. Childrens Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct., 394, 24, A. L. R. 1237; *People vs. C. Klinck, Packing Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916 D, 1051; *Wichita R. & Light Co. vs. Public Utilities Com.*, 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51; *Southern R. Co. vs. Virginia*, 290 U. S. 190, 78 L. Ed. 260, 54 S. Ct. 148; *Riley vs. Massachusetts*, 232 U. S. 671, 58 L. Ed. 788, 34 S. Ct. 469; *Miller vs. Wilson*, 236 U. S. 373, 59 L. Ed. 628, 35 S. Ct. 342, L. R. A. 1915 F. 829; *Bosley vs. McLaughlin*, 236 U. S. 385, 59 L. Ed. 632, 35 S. Ct. 345; *Holden vs. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383; *Muller vs. Oregon*, 208 U. S. 412, 52 L. Ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; *Bunting vs. Oregon*, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A 1043.

The courts have never sanctioned such unlimited delegation of legislative power as is here claimed. Indeed, at no time have they ever sanctioned any unrestricted delegation of legislative power. In the Flexible Tariff Act cases, the Interstate Commerce Commission cases, the Draw Bridge cases, the Securities and Exchange Commission cases, the Radio Act of 1927 cases, and all other cases cited by the Office of Price Administration, where the

courts have sanctioned delegation of legislative powers, the courts have found that Congress had so prescribed and fixed limits upon the power delegated as to make the agency to which such power was delegated a mere agent in fact of Congress with no discretion other than to carry out what had already been established and determined by the Congress. This policy is defined and so distinguished from the position here assumed by appellants, by Mr. Chief Justice Hughes and Mr. Justice Cardozo in separate but concurring opinions in *Schechter vs. United States*, supra.

Judicial Powers

If the suspension orders being issued by the Office of Price Administration are penalties, which we hope to show they are, then the "Hearing Administrator" and all his "Hearing Commissioners" are sitting as "courts", usurping the Judicial Powers of the United States Government in violation of Article III of the Constitution. The Constitution itself fixed this power in one Supreme Court and in such inferior Courts as Congress might from time to time ordain and establish. The provisions of the Constitution are mandatory. The word *shall* has been used so that there could be no room for doubt. As early as 1816, in *Martin vs. Hunter*, 1 Wheat. 330, 4 L. Ed. 97, the Supreme Court held: "Congress cannot vest any portion of the judicial power of the United States except in Courts ordained and established by itself," and this doctrine has

been enforced by this Court ever since. Indeed, judicial power is not Congress' to delegate. It was vested by the Constitution.

Penalties or Allocations

The Office of Price Administration seeks to justify their system of issuing suspension orders on the grounds that they are a part of the allocation system and not penalties. Judge Atwell in his able opinion in the Court below said they were penalties. (See Opinion, R. 99). The Select Committee, speaking for the House of Representatives, says they are penalties that Congress never intended to be set up or fixed.

In passing upon whether or not the suspension order here under consideration was a penalty, Judge Atwell said:

> "Remedial cases are such as afford summary adjustment through extraordinary writs, such as prohibitions, mandamus, certiorari and quo warranto. State vs. St. Paul, 28 N. W. 245; 7 Words and Phrases, 6075. Punitive is punishment for past wrongdoing, as well as to deter the defendant and others in a similar business from repeating such wrongdoing in the future. Olive vs. Columbia 43 S. E. 207. It is not thought that an order carrying results such as this one can be said to be anything other than a penalty—than punitive. The wages of transgression are the loss of business—the loss of money—the loss of actual property rights. Penalty is defined as a punishment imposed for a violation of a rule or a law.

> A painful consequence or any disadvantage attached to some procedure, as a penalty for carelessness. A disadvantage imposed upon a competitor for an infraction of the rules." (Atwell opinion, supra.)

It has been held that a supposed "tax" to compel compliance with an order is a "penalty". *Carter vs. Carter Coal Co.* 298 U. S. 238, 80 L. Ed. 1160, holding: "It is very clear that the 'Excise Tax' is not imposed for revenue, but exacted as a penalty to compel compliance with the regulatory provisions of the act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion, precisely the same as tho he did so to avoid a term in jail." How similar to the sitaution before us! In the Report of the Select Committee of the House of Represenatives, supra, there are letters and reports from the Office of Price Administration stating, specifically, that the suspension system had been adopted as the most effectual way of "enforcing the law;" "that the suspension procedure had been adopted for this purpose alone."

We are not left in doubt by the Supreme Court as to whether or not transactions of this kind are penalties. It has been held that any punishment imposed to enforce compliance with a law or a rule is a penalty. *United States vs. Constantine*, 296 U. S. 287, ante 233, 56 S. Ct. 223; *United States vs. Butler*, 297 U. S., 1, ante, 477,

56 S. Ct. 312, 102 A. L. R. 914; *Child Labor Tax Case (Bailey vs. Drexel Furniture Co.)* 259 U. S. 20, 66, L. Ed. 818, 42 S. Ct. 449, 21 A. L. R. 1432; *Hill vs. Wallace,* 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453; *U. S. vs. LaFrance,* 282 U. S. 568, 572, 75 L. Ed. 551, 555, 51 S. Ct. 278; *Wallace vs. Cutter,* 298 U. S. 229; *O'Sullivan vs. Felix,* 233 U. S. 318; *Simon Hardware Co. vs. Nelson,* District Court of the District of Columbia, decided September 17th, 1943, and not yet reported.

Petitioners urge that there is no question but that the suspension order issued against them was a penalty in the light of the decisions cited above.

The Office of Price Administration's entire brief in the Court below was devoted to the task of convincing the Courts that the "suspension order" was a part of the system of "allocation" of strategic war materials. By whatever name they call it, in the light of the cases above cited it is still a "penalty". It is still punishment exacted and threatened to force compliance with the orders and regulations promulgated by the Office of Price Administration. They say so themselves. They argue, and point to the letter of the Attorney General, and to other proceedings before the Committee of Congress, considering this bill, that their administrative "penalties" needed additional ones to assist enforcement of compliance with the law and regulations.

The decisions above cited say that by whatever name it is called if its real purpose is to "force compliance" it is

a penalty. This point is particularly stressed in *Carter vs. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

There was nothing in the cases cited by them in substantial conflict with this view.

The Office of Price Administration contended in the Courts below that because we made no attack upon the constitutionality of the Statute itself before a three-judge court we had conceded the regularity of most of their set-up. The course taken was the judgment of counsel. We set out to do no more than was necessary to protect appellees' rights. Had we deemed it necessary so to do, we, in modest disagreement with Judge Atwell's opinion, believe we could have successfully attacked the delegation of the power that was given to the President in most of the instances. Never before has counsel known of so unlimited a delegation. The delegations condemned by the Supreme Court in *Panama Refining Co. vs. Ryan* and *Schechter vs. United States*, supra, were not so flagrant. But we indulged the presumption, as the law demands we should, that Congress had no intention of delegating to anyone power to set up the systems of "tribunals" about which we here complain, because Congress could not have done so had it desired.

Due Process

If Congress did not delegate power to the Office of Price Administration to set up the "Office of Hearing Administration", or if it attempted to do so in violation of either

Articles I or III of the Constitution of the United States, then the suspension order issued against Petitioners is lacking in all the essential elements of due process, and is in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. *Hamilton vs. Kentucky Distillers & Warehouse Co.*, 251 U. S. 146, 156, 64 L. Ed. 194, 199, 40 S. Ct. 106; *Brooks vs. U. S.* 267 U. S. 432, 436, 437, 79 L. Ed. 699-701, 45 S. Ct. 345, 37 A.L.R. 1407; *Nebbia vs. New York*, 291 U. S., 502, 524, 78 L. Ed. 940, 949, 54 S. Ct. 505, 89 A. L. R. 1469.

No emergency can relieve Congress of the provision of Due Process. *Ex parte Milligan*, supra; *Wilson vs. New* 243 U. S., 332, 61 L. Ed. 755, 37 S. Ct. 298, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Home Bldg. & Loan Assn. vs. Blaisdell*, 290 U. S. 397, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481.

The "Office of Hearing Administration" under which the "Hearing Commissioners" function derives its natal status from General Order No. 46. General Order No. 46 derived its legislative birth by the simple fiat of the Administrator of the Office of Price Administration. Ration Order 5C, supra, came into being by the same token. Yet it is the "Supreme Law" governing the millions of American Citizens who deal in or purchase rationed products in the markets of this Nation!

Procedural Regulation No. 4 is their "Judicial Code." Under it they sit in judgment of the acts and conducts of

America's most vital industries. This "Regulation" specifically says that the "judge" will not be bound by the rules of evidence prescribed in our Judicial Code, but will receive "evidence" from any source and in whatever status his "discretion" deems "to the best interest." Very often it is by "hearsay." More often it is evidence of a very high technical nature from its own untrained, unskilled and inefficient employees who could, in no sense of the word, qualify as experts under our system of jurisprudence. As an examble (R. 42-43) a witness was permitted to testify as to the shortage of gasoline in one of Petitioners' stations on the measurement of some one else who told him about it. Miss Bettie K. Wolf (R. 62, et seq.) testified that the "Investigators" of the Office of Price Administration had to call her over the telephone to ascertain how to measure a tank of gasoline. These men were allowed to testify as "experts" and freely give their opinions as to the guilt of Petitioners.

The Administrator of the Office of Price Administration appoints the Hearing Administrator, the Hearing Commissioners, the investigators and the attorneys who prosecute before the "judges." A citizen who has been convicted by one of the "judges" has the glorious privilege of appealing his case to the Hearing Administrator, the boss of the "judge." The Office of Price Administration is, then, the complaining witness, the prosecuting attorney, the "judge" the "appellant court" and, finally, the execu-

tioner, in defiant disregard of the principles of separation of government functions. There is Due Process here. No wonder they so strive to prevent a citizen's redress to the courts!

Congress certainly did not "Ordain and Establish" an inferior court over which these "Hearing Commissioners" were to preside as "judges." The "judges" were not appointed by the President and confirmed by the Senate. They do not hold their office during good behavior. They may not be impeached. They answer only to the Administrator, if to anyone, and the limit of their "judgment" is bounded only by their own consciences. No wonder Judge Atwell called it "a modern example of pure dictatorship."

The questions here presented to the Court are far different from those presented in the Rent Control and Price Fixing cases recently decided. In the first place, the question there before the Court was one of power delegated by Congress. The Court found that there were sufficient standards of limitation placed upon the administrators by the Act to bring these acts within the permitted classes of delegation of legislative power. In this case the question concerns powers that the administrator has delegated unto himself. Ration Order 5c, Procedural Regulation No. 4 and General Order No. 46, supra, prescribe a series of self-delegated authori-

ties which Congress did not contemplate and, under the Rent Control and Price Fixing cases, could not have delegated. The power and procedure set out in these documents constitute an unlimited delegation of both legislation and judicial power, leaving to the "judgment" of the Hearing Commissioner what disposition shall be made of a man and his business who is brought before him. He may, upon his own "judgment", suspend a man's business for the duration of the war and thereby completely destroy the business, and if the regularly constituted courts are not permitted to intervene, then the business and industrial structure of the entire nation will depend upon the "judgment" of a hearing commissioner. Certainly, we can not believe that Congress ever intended to delegate such powers and, if they did, under all the decisions of this Court, including the decisions in the Rent Control and Price Fixing cases, this Court would not permit such delegation.

Under Question 3, Germane to Specification of Error 3

Petitioners earnestly contend that so much of Ration Order 5c as attempts to "legislate a penalty" administratively fixed, and Procedural Regulation No. 4 are in direct violation of Article I of the Constitution of the United States, and that the Office of Hearing Administration set up under General Order No. 46 is violative of Article III of the Constitution of the United States, as

well, and that any penalty enforced under such suspension orders issued by the Office of Hearing Administration would be in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. They in no way compromise or yield from this position. Yet they urge, even if this Honorable Court holds against them on these questions, the judgment of the United States Circuit Court of Appeals in this cause must be reversed and that of the trial court sustained under *Hecht Company vs. Chester Bowles*, 88 L. Ed. 465.

Had Petitioners chosen to disregard the suspension order issued by the Office of Price Administration, then the only way its provisions could have been enforced would have been by injunction proceeding brought by the Office of Price Administration in the District Court of the United States for the Northern District of Texas. Then, certainly, the rule laid down in *Hecht vs. Bowles*, supra, would have been directly in point. That your Petitioners sought relief from such court prior to the enforcement of such suspension order can not alter the principles of equity involved. The deduction naturally follows that since the trial court granted the injunction against the suspension order, he certainly would not have judicially enforced it had the Office of Price Administration brought such proceeding. It is significant that neither in their pleadings nor in any other manner, did the Office of Price Administration attack the jurisdiction of the court. On the contrary, by

filing the joint and several answer of defendants (R. 10-13), the jurisdiction of the court was conceded. Equally significant are the allegations contained in sub-paragraphs 3 and 4 of Paragraph 10 (R. 25, 26) of Petitioners' supplemental petition in answer to the answers of the defendants, in which the pleading is amply sufficient to have supported the judgment of the court under *Hecht vs. Bowles*, supra, whether or not such orders and directives of the Office of Price Administration above complained of are in violation of the provisions of the Constitution pleaded.

The penalty assessed was one for a past violation. There is no evidence, nor is there any contention on the part of the Office of Price Administration, that the violation for which the suspension order was issued was a continuing one. On the contrary, the evidence showed and the trial court so found (R. 101) that the violation, if any, was an isolated one and even that not a wilful violation. There is no contention on the part of the Office of Price Administration that the trial court abused its discretion, neither is there any evidence or lack of evidence in the record that would sustain such a proposition, even had it been pleaded. Therefore, under *Hecht vs. Bowles*, supra, the granting of this injunction was purely discretionary with the trial court, even if Petitioners' contention as to the constitutionality of the Office of Price Administra-

tion's procedure is not sustained by this Honorable Court. Neither is there anything in *U. S. vs. Morgan*, 307 U. S. 191, 83 L. Ed. 1217, 59 S. Ct. 795, contrary to this view.

Respectfully submitted,

EUSTIS MYRES,
Republic Bank Building,
Dallas, Texas
Counsel for Petitioners.

HOWARD DAILEY,
Republic Bank Building,
Dallas, Texas
Of Counsel.

APPENDIX

District Court of the United States

For the Northern District of Texas
Dallas Division

Civil Cause No. 884

FOY O. WILEMON, ET AL
VS.
PRENTISS M. BROWN, ET AL

SUIT TO RESTRAIN THE ENFORCEMENT OF A PENALTY

HOWARD DAILEY, Dallas, Texas,
for the Plaintiffs;

FLEMING JAMES, JR.,
LOWELL J. GRADY and
AMOS COFFMAN, Washington, D. C., and
WILLIAM B. HARRELL, Dallas, Texas,
for the Defendants.

OPINION OF THE DISTRICT COURT

The plaintiffs seek to restrain the enforcement of an order wherein they are "suspended, restrained and en-

joined from selling, transferring or dealing in gasoline for a period of two weeks, * * *. They claim they do a large volume of business as retailers of automobile necessities, buying their products from refiners and selling at retail to consumers who drive into their stations.

That on May 1st, 1943, they were served with an order charging them with having violated certain provisions of Ration Order 5C issued by the Administrator of the O. P. A. That there were four distinct violations alleged, the fourth of which was that on April 8, 1943 they had in their possession 1063 No. 6 Class A ration coupons which they had accepted in exchange for gasoline prior to the effective date of such coupons. That upon a hearing held in accordance with the regulations made by said Administrator, they were absolved from three of the charges, but were found guilty of "having in their possession the coupons mentioned which they had accepted in exchange for gasoline prior to the effective date. That they had not wilfully violated this provision, but they had been guilty of gross negligence and carelessness, warranting a severe penalty." He also held that they were "suspended, restrained and enjoined from selling, transferring or dealing in gasoline for a period of two weeks."

From that order the plaintiffs appealed to the "Hearing Administrator" at Washington, D. C., who held that the order should be enforced against them to begin at 12:01 A. M., August 8, 1943, and to end at 12:01 A. M., August 23rd. They plead facts showing damages in ex-

cess of $3,000.00, as a result of that order, if it is permitted to stand.

The order was stayed pending the trial on the merits of this suit wherein preliminary restraining orders were waived. Upon the trial the facts were stipulated. This stipulation fixes their damages at approximately $10,000.-00. Testimony accompanying the stipulation shows that a Mrs. Wolfe, an employee of the plaintiffs, telephoned to the O. P. A. Dallas office and asked about coupons that had been improvidently taken before they were valid. She claims that a woman who answered the phone, told her that she could hold the coupons and turn them in to the refinery after they became valid.

The authority of any employee in the O. P. A. office to make such a statement is denied by the superintendent. It must be assumed, however, that something of that sort transpired, because the "Hearing Administrator" declared that the holding and taking of the coupons was not wilful. The record also discloses that in the early days of allocation that procedure may have been indulged in by some dealers.

The plaintiffs claim that their Constitutional rights have been invaded in that there was no sufficient delegation of authority from the Congress to the President, nor by the President on down through the line of delegation, for the imposition of such an order. That it was, and is, an attempt to set up a court and to take their property

without due process. Appropriate sections of the Constitution are plead.

Ration Order 5C is labeled, "Mileage Rationing; Gasoline Regulations." It became effective on December 1st, 1942. (7 F. R. 9798). It provides, "Any person who violates that Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline or other rationed product, or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

The pedigree of that order is Sec. 2 (a) Act June 28, 1940, 54 Stat. 676, as amended by Act May 31, 1941, 55 Stat. 236, entitled, "Priorities and Allocations Act," and by Title III of the Second War Powers Act, 1942, March 27th, 56 Stat. 176, 50 U. S. C. A., Appendix 636.

On February 6th, 1943, the Administrator issued Procedural Regulation No. 4, effective March 1st, 1943, which provided for a hearing before a "Hearing Administrator" and for suspension decrees. 8 F. R. 1744, 2035.

If there was authority for the procedural order it sufficently guarded the safety and rights of the plaintiffs.

Only those coupons are valid from consumer to dealer which so show on their face, and gasoline may not be trans-

ferred for any other than valid coupons. The 1063 coupons represented an aggregate of 4252 gallons. They were accepted six weeks before they were valid.

There is no question of the plaintiffs' right to enter court. They have pursued to a finality their Administrative remedy. Nor is there any doubt that the Congress gave the President the authority to allocate any material or facilities for defense "upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." The Congress also authorized the President to exercise "any power, authority, or discretion conferred on him by this section, through such department, agency or officer of the government as he may direct, and in conformity with any rules and regulations which he may prescribe."

On September 8th, 1939, the President had issued a declaration that a national emergency existed, and there followed the executive decree formulating and appointing the bureaus and executive officers, through which the various steps of this proceeding were carried. It must be conceded that the power of allocation is validly entrusted to the Executive.

The defendants claim, and their claim seems well taken, that at the time of the passage of the Second War Powers Act, which re-enacted Sec. 2 (a) of the Priorities and Allocation Act in Title III, the Congress knew that the Boards had been claiming the power to, and, in fact, had

been issuing suspension orders against dealers whom they claimed had violated the rationing regulations. (Senate Report 989, 77th Congress, Second Session). (88th Congress Record February 24, 1942, page 1634). The Attorney General sought and secured criminal remedies, claiming that Administrative suspensions, although highly important, did not provide a proper penalty in every case.

Without stopping to cite pertinent authorities, we, therefore, have a situation which indicates validity in the entire procedure, with the exception of the right of the "Hearing Administrator" to fix a penalty such as was here imposed.

If we consider the breadth and scope of the order entered against the plaintiffs, we find considerable difficulty in concluding that it is "merely remedial." It is not the legitimate outgrowth of the right to allocate, or to ration. It borders on a confiscation of the plaintiffs' business for two weeks. It destroys that business for that period. Both employees and customers are, and necessarily will be, demoralized. The loss will be heavy.

The facts show that there is no dispute about the possession of these inappropriate coupons. If gasoline had been exchanged for them, then that product had already left the stream which would supply the nation's needs. There is no charge that the coupons were to be, or were, in fact, used for another transfer. The damage, if damage there was, had already been done. When the valid

date for the use of such coupons arrived, they were passed on by the plaintiffs and used in the replenishing of their tanks.

One always feels the poverty of words when it comes to defining the simple. This case really must be ruled by deciding whether this order was remedial or punitive.

The Supreme Court in *Wallace vs. Cutten*, 298 U. S. 229, quite briefly, and quite in point, denied an Administrative body similar punitive power. See also *United States vs. LaFrance*, 282 U. S. 568; *O'Sullivan vs. Felix*, 233 U. S. 318; *Simon Hardware Company vs. Nelson*, District Court of Columbia, decided September 17, 1943, and not yet reported.

The Congress did not vest in the defendants such a power as is here exhibited. If it did, it presumed to act improperly, which presumption will not be indulged. We must find that it acted constitutionally, if possible, and lay the blame where it belongs, to-wit, on the "Board."

Remedial cases are such as afford summary adjustment through extraordinary writs, such as prohibitions, mandamus, certiorari and quo warranto. *State vs. St. Paul*, 28 N. W. 245; 7 *Words and Phrases*, 6075. Punitive is punishment for past wrongdoing, as well as to deter the defendant and others in a similar business from repeating such wrongdoing in the future. *Oliver vs. Columbia*, 43 S. E. 307. It is not thought that an order carrying results such as this one can be said to be anything other than a

penalty—than punitive. The wages of transgression are the loss of business—the loss of money—the loss of actual property right. Penalty is defined as a punishment imposed for a violation of a rule or a law. A painful consequence of any disadvantage attached to some procedure, as a penalty for carelessness. A disadvantage imposed upon a competitor for an infraction of the rules.

The "Hearing Administrator" unknown to and unprovided for by the Congress, presumes to conduct a court. Procedure is prescribed by his superior for such conducting. He enters a judgment concerning which there is no limit fixed. No maximum. No minimum. He acts without any fear of consequences for malfeasance, or misfeasance. If he can suspend for two weeks, he can suspend for two years. He is not only unknown to the Congress, but he is unknown to the Constitution. Art. 3, Sec. 1, vests such power in one Supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The judges hold during good behavior, and receive a stated compensation. They must be appointed by the President and confirmed by the Senate. They may be impeached.

What the "Hearing Administrator" does is beyond the reach of Executive forgiveness. He, himself, is beyond the reach of any Constitutional removing power. He is a modern instance of pure dictatorship.

Sec. 2 of the same Article, vests this sort of power in all cases arising under the Constitution. This is a case that

arises directly under the Constitution because of the declaration of war and the following of that declaration by the passing of the statutes out of which grow the delegations of authority for allocation. As a result of such delegation of authority, there was conceived and born a "Hearing Administrator" who is and was without Constitutional father or mother. No attempt at baptism in the waters of conflict can change his parentage and make it legitimate.

This view of a penalty, or, punishment, is sustained by a further reading of the Allocation Act, which provides for the criminal punishment of the citizen who violates its provisions, and also for equitable restraints, both of which take place in named courts.

Even the gasoline which was legally acquired, may not be sold for two weeks. The business is closed. The same contention was made by the Administrator in *Wallace vs. Cutten*, supra, that is made here. The commission claimed that in depriving Cutten of the right to trade for a period that they acted remedially and not punitively.

An unanimous court, speaking through Mr. Justice Brandeis, said that, "What the government asks is not a construction of the statute, but, in fact, an enlargement of it by the court, so that what was omitted, presumably (possibly) by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. A fortiorari it may not be done for the purpose of mak-

ing punishable that which on the face of the statute, is merely prevented." There is nothing in *Union Bridge Co. vs. United States*, 204 U. S. 364 that weakens the position.

This question as to the nature of the order is one of fact which must be judicially determined. *Kessler vs. Strecker*, 307 U. S. 22. Power may not be delegated Constitutionally in the absence of well-defined limits, nor can it be delegated at all to do what the Constitution forbids, or, vests in a different sphere. The court must exercise some degree of supervision over the activity of an Administrative body. Someone must have the power to say whether the Congress has complied with its charter of authority in the enactment of a statute. There can be no fault found with this statute so far as the Congress is concerned. The fault is with the Board or the persons who seek to act under the statute. The court is the repository of this power to scrutinize. An Administrative tribunal cannot be permitted to be the final judge of its own compliance with the law.

Having in mind all of the Constitutional reach that is bestowed during the existence of War, a judgment such as this cannot be permitted to stand unchallenged. The restraint prayed for should be granted. This decision should not be construed as going any further than is specifically

indicated, to-wit, an order which fixes a penalty under this Act such as was entered here is invalid.

.....

United States District Judge.

Done at Dallas, Texas,
this the 29th day of
September, A. D. 1943.

United States Circuit Court of Appeals

For the Fifth Circuit

No. 10840

PRENTISS M. BROWN, Administrator, Office of Price Administration, et al., (CHESTER BOWLES, Substituted as Party Appellant in the Place and Stead of Prentiss M. Brown)

Appellants,

VERSUS

FOY O. WILEMON and AMOS E. WILEMON, Doing Business Under the Trade Name of Good Luck Oil Company, a Partnership,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

Opinion of the Circuit Court
(January 13, 1944)

Before SIBLEY, HOLMES and WALLER, Circuit Judges.

SIBLEY, Circuit Judge: The appellees, plaintiffs below, are liencesed operators of gasolene filling stations in Dal-

las, Texas. Under the allocation regulations of the Office of Price Administration they registered as distributors and undertook to make the required reports. On May 6, 1943, a hearing was set to ascertain whether because of violations of the rationing order 5C they should be suspended from dealing in gasolene. The Hearing Commissioner found that appelleees had during April sold some 4,000 gallons of gasolene on 1063 rationing coupons six weeks before the coupons were usable; and he ordered that appellees "be prohibited from selling, tranferring or dealing in gasolene for a period of two weeks." On appeal the Hearing Administrator confirmed the order, declining to consider whether the Hearing Commissioner had constitutional authority to make such suspension orders. Thereupon appellees applied to the district court for an injunction on the ground that legislative power was being exercised in imposing punishments and penalties not authorized by Congress, and judicial power in trying the right of appellees to continue in business, in violation of Articles 1 and 3 of the Constitution. The District Court held the suspension order was punitive and not remedial, and that Congress had vested no power in the President and his agencies to fix punishments or to adjudge them, and that injunctive and penal remedies in the District Court provided in Section 205 of Title II of the Act of Jan. 30, 1942, 56 Stats. 33, are alone to be pursued. The injunction was granted. —— Fed. Sup. —— This appeal followed.

The district courts have differed on the questions presented. Typical of the opposite view is another case in the

Fifth Circuit, Perkins v. Brown, —— Fed. Sup. —— We think the case last cited takes the sounder position. The statutory authority for what has been done must be found in the following words: "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in the shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense." sec. 2 (a) 2 of the Act of June 18, 1940, as amended by the Act of May 31, 1941, 55 Stats. 236. Section 2 (a) 2 permits the President to act through such agency or officer as he may direct, "and in conformity with any rules or regulations which he may prescribe." The allocation of gasolene came to be vested in the Office of Price Administration, and ration order 5C (7 Fed. Reg. 9135) was issued whereby the gasolene allocated for use by civilian consumers was regulated through the issuance to them of ration coupon books. These coupons are to be taken up by the filling stations when gasolene is sold, and may not be honored before their due date. Section 1394.-8302 of ration order 5C provides that any person who violates the ration order may "by administrative suspension order" be prohibited from receiving, selling, using or disposing of gasolene for such period as is deemed "necessary or appropriate in the public interest and to promote the national security." The suspension order, whether direct-

ed against the filling station operator or the consumer himself, thus professes to be an administrative order intended to promote the national security, rather than a penalty.

That it may so operate seems clear to us. The allocation of gasoline is first of all between the military and civilian users. That allocated to civilian users must also be rationed according to the fair needs of all and with reference to their contribution to the defense effort. The distribution to civilian consumers might have been made through government establishments which would have put all filling stations out of business for the period of rationing. Instead of doing that, the filling stations were required to register as distributors and to make reports from which the operation of rationing could be checked. Though no license was issued, such was the effect of the arrangement; and by acceptance of it the filling station operators impliedly agreed to abide by the regulations. They became in effect the appointees of the government to assist in the administration of the rationing. If any of them should prove untrustworthy or non-cooperative, we think it a fair exercise of administrative power to withdraw from such, temporarily or permanently, the privilege of distributing the allocated and rationed material. That this was provided for by regulation in advance does not alter the essence of the matter. That a business loss will be caused, or more accurately the failure to make an anticipated business profit, is also not controlling. The true purpose must be held to be to protect the efficacy of rationing rather than to punish for past misdeeds.

By this Act a wilful violation of the regulations is made a criminal offense punishable by fine and imprisonment. Also injunction is provided in some cases, the final effort of which is imprisonment for contempt in case of further wilful violation. The present case is not one of wilfulness but negligence. The Hearing Administrator explained his action thus: "The privilege of dealing in and distributing such a strategic and rationed commodity as gasoline in time of war can be accorded only to those who are both willing and able to comply with the rationing regulations. . . . Thus wilfulness is not a necessary element in establishing a violation of a ration order. The purpose of suspension order proceedings is to determine whether a respondent may continue to be entrusted with the privilege of dealing with rationed commodities without further limitations." The privilege in a proper case can be taken away altogether. A less drastic cautionary suspension is also within the limits of appropriate administration.

Punishment or penalty in America consists in taking life, liberty, or property. A suspension order takes neither. The dealer's personal liberty is untouched. Nothing that is really his is taken from him. His filling station is unmolested and may be used to sell things other than gasoline, and to service cars. Even his gasoline is not taken from him. He is prohibited for a brief period from distributing it or from getting any more. There is damage by the interruption of his business, but damnum absque injuria. His private interest has merely come into collision with a public interest, and has had to yield.

In the railroad business, it is of the utmost importance that enginemen be skilful and reliable. Their jobs are secured by union agreements, and suspension or dismissal commonly cannot be visited without a hearing. But although suspension or dismissal necessarily causes a financial loss, it has never been denied that such discipline is a legitimate exercise of railroad management and administration. It seems reasonable to us that a similar power be considered to vest in the Administrator in using the filling station operators to assist in the work of rationing. A suspension order which affects nothing but the rationed gasoline is a proper implementation of rationing, and was at once used without special legislative mention. It was not substituted or superseded by the punitive provisions later added to the Act to stop wilful misconducts.

It is true that the Office of Price Administration, like many other administrative boards and commissions, has put forth a great mass of regulations which look like legislation, and has established an elaborate system of quasi courts. It is said thus to have established an imperium in imperio, and this has provoked adverse public comment. We confine ourselves to the case before us. We do not think a penalty has been ordained or adjudged in such a sense as to require the action of Congress and a court; but that observance of rationing rules may as a matter of administration be made "a condition" of participation in

allocation, as mentioned in the Act, and that temporary suspension is a proper enforcement of the condition.

The judgment is reversed and the cause remanded with direction to dismiss the complaint.

REVERSED.

A True copy:
Teste:

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Clerk of the United States
Circuit Court of Appeals
for the Fifth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1943

E. C. WILLAMON AND AARON T. WILLAMON, DOING BUSINESS UNDER THE TRADE NAME OF GOOD LOOK OIL CO., INC., A PARTNERSHIP, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 854

FOY O. WILEMON AND AMOS E. WILEMON, DOING BUSINESS UNDER THE TRADE NAME OF GOOD LUCK OIL COMPANY, A PARTNERSHIP, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 99–106) is reported in 51 F. Supp. 978. The opinion of the Circuit Court of Appeals (R. 114–117) is reported in 139 F. (2d) 730.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was en-

tered on January 13, 1944 (R. 118). The petition for a writ of certiorari was filed in this Court on April 6, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the power granted to the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 177, 50 U. S. C. App. (Supp. III), sec. 633 et seq.). Section 2 (a) (2) reads, in part:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any

> material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) provide for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order 5C (7 Fed. Reg. 9135–9160), provided for the rationing of gasoline. Section 1394.7652 read:

> Coupons contained in Class A books shall be valid for the transfer of gasoline to a consumer only during the periods indicated below.

Coupons numbered	Valid period
3.	November 2, 1942, to January 21, 1943, inclusive.
4.	January 22, 1943, to March 21, 1943, inclusive.
5.	March 22, 1943, to May 21, 1943, inclusive.
6.	May 22, 1943, to July 21, 1943, inclusive.

Section 1394.8302, as amended on March 2, 1943 (8 Fed. Reg. 2720, 2721), reads:[1]

> Suspension orders.—Any person who violates this Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline, tire or passenger automobile. Proceedings for the issuance of suspension orders shall be instituted and governed pursuant to the provisions of Procedural Regulation No. 4.

By Executive Order 9125 (7 Fed. Reg. 2719–2720) the President had conferred his power under Title III of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By supplementary Directive 1–Q (7 Fed. Reg. 9121), the War Production Board had delegated to the Office of Price Administration specific authority over the rationing of gasoline.

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[1] Prior to its amendment, section 1394.8302 read:

"Suspension orders.—Any person who violates this Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771). At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).

STATEMENT

Petitioners seek review of a judgment of the Circuit Court of Appeals for the Fifth Circuit which reversed the judgment of the district court (R. 107) permanently enjoining the respondents from putting into effect or enforcing a rationing suspension order.

On August 7, 1943, the petitioners brought suit in the district court to enjoin enforcement of a suspension order issued by the Office of Price Administration, prohibiting petitioners from dealing in gasoline for a two-week period. The petitioners are retail distributors of gasoline in Dallas, Texas, owning and operating seven large filling stations (R. 27). From December 1, 1942, to May 5, 1943, they sold more than 1,000,000 gallons of gasoline (R. 20, 55).

On May 1, 1943, the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioners. A Notice of Hearing was served charging petitioners with four types of violation of Ration

Order 5C (R. 14). One charge was that the petitioners possessed 1,063 No. 6 Class A ration coupons on April 8, 1943, which had been accepted in exchange for gasoline before their effective date (May 22, 1943).

Hearing was held on these charges before a Hearing Commissioner on May 17, 1943, with petitioners (the respondents in the administrative proceeding) appearing in person and by counsel (R. 27).[2] The charge of possessing 1,063 invalid coupons was readily admitted by petitioners (R. 19, 31, 78), but they asserted that their employee had telephoned to the County Ration Board for information and had been told by a lady clerk that they might hold such coupons until the date of validity and then turn this ration evidence[3] over to their suppliers for more gasoline (R. 64, 73). The office manager and chief clerk of the Ration Board, Mr. Guebert, testified that in the ordinary course of affairs a request for information such as the petitioners allegedly made would have been referred to him by the subordinate employees of the Board (R. 46–50).

The Hearing Commissioner by oral ruling narrowed the issue to the one charge of transfer to

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[2] The hearing had been adjourned from May 7, 1943, to May 17, 1943 (R. 27).

[3] "Ration evidence" means a token authorized by the Office of Price Administration to represent a right to receive a transfer of gasoline and exchangeable for such gasoline subject to the conditions set forth in the Order.

consumers of gasoline in exchange for invalid coupons, contrary to the provisions of Section 1394.8152 of Ration Order 5C (R. 98). On May 25, 1943, he issued a suspension order. This order forbade the petitioners from selling, transferring, or dealing in gasoline from June 14, 1943, to July 1, 1943, a two-week business period. (R. 17, 18.)[4] Pending an appeal to the Hearing Administrator, however, the operation of the suspension order was stayed (R. 27–28).

On July 20, 1943, the Acting Deputy Hearing Administrator affirmed the suspension order, vacated the stay, and advanced the term of suspension to run from August 8, 1943, to August 25, 1943 (R. 22).[5] He found that petitioners fell far short of minimum standards of care that may reason-

[4] Certain of the inaccuracies in the Petition should be noted at this point. It is stated (Pet. p. 9) that the district court quoted the Hearing Commissioner's finding that petitioners' conduct warranted "a severe penalty." In fact the district court was merely quoting petitioners' own complaint (R. 4) in the process of setting forth petitioners' arguments (R. 100). The Hearing Commissioner's order contained no such statement (R. 17–18). On page 21 of the supporting Brief the same sort of statement is attributed to the Hearing Administrator; we invite inspection of the Record reference given by petitioners (R. 21). The description, on page 10 of the Petition, of the "violation" as "an isolated one" is not a very precise statement of petitioners' conduct in accepting over 1,000 invalid coupons; and attribution of such a finding to the district court has no foundation in the Record.

[5] The Acting Hearing Administrator disqualified himself since he had been the Office of Price Administration Regional Attorney at the time the proceedings were commenced.

ably be expected of dealers in rationed commodities in critical times, and were willing to conduct large-scale operations contrary to the provisions of the Ration Order on the basis of an alleged informal conversation with a clerk (R. 21).

On August 7, 1943, the petitioners brought this action to enjoin enforcement of the suspension order (R. 1). The suspension order was administratively stayed pending the final determination of this cause (R. 28). The petitioners, in their complaint, specifically stated that they were not seeking to have an Act of Congress held unconstitutional (R. 8). They contended, however, that the creation of a Hearing Commissioner under the statute was in violation of Articles I and III of the Constitution on the ground that he was acting as a judicial officer under a mere administrative Regulation (R. 7); that Ration Order 5C was being used as a law contrary to Article I since it had not been passed by Congress (R. 6–7); and that an unconstitutional taking of property contrary to the Fifth Amendment was worked by assessment of a penalty by a person assuming to possess judicial powers (R. 7). Since the petitioners specifically disavowed any intention to attack an Act of Congress, and thus the single district judge obtained jurisdiction of which 28 U. S. C. Sec. 380a would have deprived him if there had been such a constitutional attack, the last-mentioned objection must be taken to mean

that the Fifth Amendment is violated because petitioners were suspended without statutory authorization for such administrative withdrawal of an allocation.[6] In a "Supplemental Petition" filed on September 25, 1943, without leave of court,[7] the petitioners further contended that no substantial evidence was adduced at the administrative hearing on this cause to show that they had violated the provisions of Ration Order 5C; and that they had acted in good faith upon advice of the Dallas County Rationing Board (R. 25, 26).

On October 2, 1943, the District Court permanently enjoined the putting into effect and enforcement of the suspension order solely on the basis of the lack of statutory authorization for such a suspension (R. 99–108).[8] The court, in its opinion, conceded that due process had been observed in the administrative hearing but concluded that the suspension order was beyond the powers given by Congress. On January 13, 1944, the Circuit Court of Appeals reversed the judgment below (R. 114–118).

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[6] Petitioners state (Pet. p. 8) that a question presented is the constitutionality of the Act. This should be compared with the complaint (R. 8), where such an attack is disavowed, and with the supporting Brief, at p. 51.

[7] See Rule 15 (d), Rules of Civil Procedure.

[8] Since the only question considered by the trial court was one of statutory authorization and the injunction issued was on the basis of lack of such authorization, the scope of review for abuse of discretion of a court of equity was not involved in the court below. (But cf. Pet. p. 8, and Point 3 of supporting Brief, p. 24.)

DISCUSSION

The only issue presented by the petition which would warrant review is the question of statutory authority for suspension orders in connection with rationing under the Second War Powers Act, *supra,* pp. 2–3. Cf. notes 6, 8, p. 9, *supra.* That question is before the Court in *L. P. Steuart & Brother* v. *Bowles,* No. 793, present Term.

The suspension order in the present case differs in its terms from that in the *Steuart* case, and the considerations underlying its issuance may be briefly stated. The violations calling for a short-term suspension in the instant case arose out of petitioners' negligent conduct of a large-scale enterprise handling a war-scarce commodity. Petitioners accepted gasoline coupons before the date of their validity. The limitation on the time during which gasoline coupons may be cashed in for the rationed good achieves three essential results. In the first place, the limitation of the period of coupon validity enables the Government to balance the total demand for gasoline by consumers possessing cashable current coupons with the total supply of gasoline that may be expected to flow into the hands of distributors. A fairly even consumer demand can thus be achieved and periods of complete drought can be avoided. In the second place, the period ration system spreads each consumer's use of gasoline so that he will not imprudently leave himself without supplies and

so that he may meet his basic driving needs during the entire year. Finally, the period system permits the Government to reappraise the value of gasoline coupons and assign new values, based on current supply, without unfair injury or advantage to consumers who have, on the one hand, saved their coupons or, on the other, expended them freely.

It should be remembered that petitioners accepted coupons whose value might be considerably smaller when they actually became valid, or even have no cashable value at all. Petitioners indulged in this practice contrary to the clear provision of the Ration Order and the understanding of even casual participants in the ration system. The only excuse offered was an alleged waiver of the provision by a subordinate clerk of a local Ration Board. The Government cannot thereby be estopped (*Nichols & Co.* v. *Secretary of Agriculture,* 131 F. (2d) 651 (C. C. A. 1st); *United States* v. *Globe Indemnity Co.,* 94 F. (2d) 576, 578 (C. C. A. 2d), certiorari denied, 304 U. S. 575; *Securities & Exchange Commission* v. *Torr,* 22 F. Supp. 602, 612 (S. D. N. Y.)). The need for a cautionary order for such irresponsible and negligent conduct seems clear.

Because of the pendency of the same question of law in the *Steuart* case, the Government does not oppose the petition for certiorari but suggests

that action thereon may properly be withheld until decision is rendered in the *Steuart* case.

Respectfully submitted.

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THOMAS I. EMERSON,
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MAY 1944.

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